NO. 85-468 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH BOARDMAN and HENRY BOARDMAN,
Petitioners

versus

UNITED SERVICES AUTOMOBILE ASSOCIATION
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JURISDICTIONAL RESPONSE

The Petitioners fail to assert any special or important reason for this Court's review as required by Supreme Court Rule 17. As amply reflected in the Petition for Writ of Certiorari, there is no substantial federal question presented for review.

STATEMENT OF THE CASE

The facts of this litigation are undisputed and are set forth in a stipulation between the parties contained in (App. 36-39), to the Petition for Certiorari.

On October 25, 1982, the District Court for the Southern District of Mississippi, applied Mississippi law to the construction of Respondent's contract of insurance issued in Nebraska to a Nebraska resident. The Respondent filed an appeal to the United States Court of Appeals, Fifth Circuit, and on October 23, 1984, the Court of Appeals certified stipulated issues to the Mississippi Supreme Court for resolution. The Supreme Court of Mississippi on May 22, 1985, unanimously answered the questions certified, thus holding that the District Court erred in applying Mississippi law to the non-forum contract of insurance. The decision was subsequently adoped by the Fifth Circuit on August 19, 1985. Being aggrieved over the decision, the Petitioners are now attempting to make an untimely and unmeritorious constitutional argument for the issuance of Writ of Certiorari, in order to escape final judgment which is legally, as well as, constitutionally inevitable.

RESPONSE TO ARGUMENT I

The Petitioners' contention that the Mississippi Supreme Court can not reach a legal conclusion contrary to that of the District Court without first holding the latter's factual findings are clearly erroneous under Rule 52(a) Fed. R. Civ. P., is inappropriate from a procedural standpoint, erroneous upon legal analysis and insufficient as a jurisdictional ground for resolution by this Court. First, the choice of law decision of the Mississippi Supreme Court involves application of law to certain stipulated facts provided by the parties. (App. 46-48) Therefore, the Mississippi Court was not engaged in any fact-finding activity, but merely one involving law application. The case upon which the Petitioners rely makes clear that conclusions of law and mixed questions of law and fact are not governed by Rule 52(a). *Pullman - Standard, Inc. v. Swint*, 456 U.S. 273, 287-288 (1982).

Secondly, the Mississippi Court's motivation for reversal was "that the United States District Court for the Southern District of Mississippi has misunderstood and misapplied our law." (App. 47) Again, *Swint* mandates affirmance, not reversal. In holding that Rule 52 does not apply to conclusions of law, this Court affirmed the view "that if a District Court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Id.* at 287

Even though the District Court disposed of the case now on appeal by summary judgment thus incorporating findings of fact and conclusions of law in the lower court's order, the universal rule is that such findings are not protected by the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). 9 C. Wright and A. Miller, Federal Practice & Procedure §2575 (1971); *New York Life Ins. Co. v. Baum*, 707 F.2d 870,871 (5th Cir. 1983); *Gaines v. Haughton*, 645 F.2d 761,

764 (9th Cir. 1981) cert. denied 454 U.S. 1145 (1982); *Williams v. Borden, Inc.*, 637 F.2d 731, 739 (10th Cir. 1980); *Tygrett v. Washington*, 543 F.2d 840, 844 (D.C. Cir. 1974).

In conclusion, certiorari is inappropriate on this issue since the Mississippi Supreme Court merely corrected the District Court's misunderstanding and misapplication of state law, a task which did not require the Mississippi Court to engage in any fact-finding activity. Even if this were not so, the weight of authority accords no Rule 52 protection to the findings of fact on a summary judgment motion.

RESPONSE TO ARGUMENT II

The premise that the Mississippi Supreme Court's choice of Nebraska insurance law to govern the validity of the coverage exclusion offends the Full Faith and Credit clause, Article IV, Section I, is flawed at its core. A violation of the Full Faith and Credit clause occurs only when the forum state refuses to respect the laws of a non-forum state, yet the complaint here is that the forum state enforced non-forum law to the exclusion of its own law. In each case which Petitioners rely, the Full Faith and Credit challenge was mounted by the party in the respondent's position urging the application of the law of a state other than the forum, arguing that the failure to apply the non-forum's law violated his rights under the full faith and credit clause. *Phillips Petroleum v. Shutts*, 53 USLW, 4879 (1985), (Phillips seeking application of Texas and Oklahoma law in Kansas forum); *Allstate Insurance Company v. Hague*, 449 U.S. 302 (1981), (Allstate urging enforcement of Wisconsin law in Minnesota forum); *John Hancock Mutual Life Insurance Company v. Yates*, 299 U.S. 178 (1936), (Insurer asserting New York law applies in Georgia forum); *Home Insurance Company v. Dick*, 281 U.S. 397 (1930), (Mexican law

interposed in Texas forum). In short, this argument could logically have been asserted only by the respondent herein.

The due process attack on the decision below is, likewise, unfounded. This court's review of state choice of law decisions does not extend to whether a particular state court's choice of law analysis is preferred or whether this court would make the same choice of law decision if sitting as a state court. *Hague, supra*, at 307. Rather, this court's sole function in reviewing such decisions is "to determine whether the [state] Supreme Court's choice of . . . law . . . exceeded federal constitutional limitations." *Id.*

Implicit in this restriction is the long standing recognition that a state court faced with a given set of facts or an issue within the lawsuit may constitutionally apply the law of more than one jurisdiction. *Id.* So long as the minimum constitutional requirements are met, the United States Supreme Court intrudes no further to . . . "insure that the state courts correctly apply whatever choice of law rules they have themselves adopted", *Id.* at 322, (Stevens, J. concurring), because this is "purely a question of local common law . . . with which this court is not concerned." *Kryger v. Wilson*, 242, U.S. 171, 176 (1960).

This court traditionally reviews the constitutional sufficiency of a choice of law decision under the due process clause and the full faith and credit clause by examination of "the contacts of the state whose law was applied with the parties and with the occurrence or transaction giving rise to the litigation." *Hague, supra*, 308. The modest restrictions imposed by Due Process and Full Faith and Credit require:

> that for a state's substantive law to be selected in a constitutionally permissible manner,

> that state must have a significant contact or aggregation of contacts, creating state interest such that the choice of its own law is neither arbitrary nor fundamentally unfair. *Shutts*, *supra*, 4885 (quoting *Hague*, *supra*, 312-13).

Contrary to the Petitioners' assertion, the contacts listed below more than meet the minimum constitutional requirements for applying Nebraska law to interpret the coverage under this policy:

1. The place of contracting was in Nebraska.

2. The place of performance was substantially in Nebraska.

3. The principal location of the risks insured against, i.e., where the cars were garaged, was in Nebraska.

4. The residence of Petitioner Henry Boardman was in Nebraska.

5. USAA did business in Nebraska.

In addition, the outcome determinative issue–whether Petitioner Joseph Boardman was an "insured" under the policy having any right to sue under the uninsured motorist provision of the policy–requires him to maintain that he was a resident of the same household as his father, in Nebraska. (App. 56-57). The presence of a non-forum insurance policy covering risks and residents primarily located in the non-forum has long been recognized by this Court as sufficient contacts under the Due Process and Full Faith and Credit clause to apply non-forum law. *Dick*, *supra*, at 407-08;

Yates, *supra*, at 182. The above aggregation of contacts creates a substantial state interest in Nebraska such that interpreting an insurance contract covering residents and risks pricipally located in Nebraska in accordance with that states's public policy, cannot be termed arbitrary nor fundamentally unfair.

A cursory comparison of the cases cited by the Petitioners for reversal to the case at bar reveals instead that they support the decision below. *Dick* and *Yates*, like the case at bar, involve insurance policies issued in the non-forum state covering risks located in the non-forum. In both cases, this Court reversed application of forum law which " . . . rested exclusively on the presence of one non-significant forum contact . . .", *Hague*, *supra*, at 309, namely, the Plaintiff's post-occurrence change of residence to the forum.

The Petitioners incorrectly assert that *Hague*, in effect, overruled *Dick* and *Yates* to hold "that a post-occurrence change of residence to the forum may be sufficient in and of itself to confer power on the forum state to choose its law." (Pet., 16). In fact, the plurality opinion said to the contrary that such a factor was " . . . insufficient in and of itself to confer power on the forum state to choose its law . . ." *Hague*, *supra*, 319. (Emphasis added). Justice Stevens, although concurring in the Judgment, went further to agree with the dissenters that this factor was constitutionally irrelevant. (Cf. *Hague*, *supra*, at 331, (Stevens, J. concurring) and 337, (Powell, J. dissenting). That this court has " . . . generally accorded such a move little or no significance . . ." was restated only last term in *Shutts*, *supra*, 4885.

The contacts proposed by the Petitioners in support of applying Mississippi law to this case were properly dispensed by the Mississippi court as relevant not to choice of law, but *in personam* jurisdiction and venue. (App. 57-64).

This Court used this distinction last term to reject an attempt by Kansas to use " . . . the assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law." *Shutts*, *supra*, at 4885.

Even assuming *arguendo* that the Boardmans' post-accident removal to Mississippi, together with other factors, justified in Due Process terms, the application of Mississippi law to this case, they have no Federal Due Process right to that result. Where the facts would permit enforcement of the law of more than one jurisdiction, the choice is purely a question of local common law. *Kryger*, *supra*, at 176. Having met the Due Process test through non-forum contacts similar to *Dick* and *Yates*, the decision of applicable law is left up the forum's highest court. *Hague*, *supra*, at 307.

The Petitioners make much of the Mississippi Supreme Court's inadvertent and understandable inclusion of the "Nebraska agent" factor among those supporting Nebraska law. Yet, nowhere in the entirety of the court's opinion is that factor accorded any greater significance than the other five factors involved, nor does the court indicate that it was in any way decisive or outcome–determinative. Consequently, in view of the significant other contacts noted by the court with Nebraska, this factor does not give rise to a constitutional defect.

Where, as here, the aggregation of contacts meets constitutional muster, this court's function is concluded, since the relative importance of particular facts to a given state choice of law question presents no claim of federal constitutional significance. This Court should rest assured that the forum's highest court would not lightly subordinate its own public policy to that of a sister state without examining both the forum and non-forum contacts carefully and sensi-

tively. While the decision below reveals unusual scholarship and legal analysis, in the context of decisions from other state courts, it is an ordinary and accepted result. See *Travelers Indemnity Co. v. Sterns*, 116 N.H. 285, 358 A.2d 402 (1976), (Policy issued in Massachusetts to Massachusetts resident; accident in New Hampshire; Massachusetts law applied to construction of policy); *Lewis v. American Family Insurance Group*, 555 S.W.2d 579, (Ky. 1977), (Policy issued in Indiana to Indiana resident covering vehicles garaged in Indiana; accident in Kentucky; Indiana law applied to construction of policy).

In sum, the Petitioner's Full Faith and Credit argument is an illogical attempt to put themselves in the shoes of the Respondent. The Mississippi Supreme Court relied upon a constitutionally approved aggregation of non-forum contacts to apply non-forum law, and its treatment of the factors relied upon by the Petitioners accords with an unbroken line of authority from this Court. Clearly, no issue of broad constitutional significance is raised.

CONCLUSION

It is respectfully suggested by the Respondent that a review and examination of the opinion of the Mississippi Supreme Court answering the certified questions, reveals immediately its constitutional sufficiency under the Full Faith and Credit and Due Process clauses. The decision of the Mississippi Supreme Court is amply supported by an aggregation of contacts with Nebraska by the parties and the occurrence or transaction sufficient to pass constitutional muster. Respondent strongly urges this Court to afford to the Mississippi Supreme Court that degree of respect to which it is entitled and to uphold its well reasoned, fair and constitutionally sound decision solicited on certification. Since there is no substantial federal question involved

for review, certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, BILLY W. HOOD, do hereby certify that I have this day mailed, postage prepaid, three true and correct copies of the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to the Honorable Ben F. Galloway, at his usual mailing address of Post Office Box 218, Gulfport, Mississippi 39502.

SO CERTIFIED this 16th day of October, 1985.

BRYAN, NELSON, ALLEN,
SCHROEDER AND COBB

BY: Billy W. Hood jma
Billy W. Hood